No. 44151-9

COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

Clyde Reed Jr., Appellant

v.

Catherina Y. Brown, Respondent

BRIEF OF APPELLANT
Revised May 24, 2013

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9. The trial court erred in its award of attorney's fees to the Respondent's attorney in response to Petitioner's Motion for Revision of October 18, 2012.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

The trial court ruled that the Respondent is designated as the primary residential parent based primarily on the fact that the

Respondent has had primary residential status during the tenure of the temporary plan, since the child's birth. Does the Respondent's assignment of primary status during the tenure of the temporary plan justify the court's assignment of Respondent as permanent residential parent?

1. The trial court erred in concluding that the length of time spent by the Respondent with the child as primary residential parent during the tenure of the temporary parenting plan supports granting primary residential placement to the Respondent.

The trial court ruled that the strength, nature and stability of the relationship with the child favored the Respondent. Can the trial court so rule when the Respondent presented no evidence in support, beyond the inappropriate evidence that the Respondent has been the primary parent since birth? The trial court ruled that only evidence pertaining to the period after December 2008 and before November 2009 would be allowed. Can the trial court then not only accept, but repeat in its ruling, evidence pertaining to the period before December 2008?

2. The trial court erred in its judgment that the Respondent established that a greater bond existed between her and the child than between the Petitioner and the child; The trial court further erred in accepting, and in repeating in its judgment, that the Respondent had established a greater bond with the child because she had been the primary parent since birth--when the court had specifically required that no information regarding the period prior to December 2008 would be accepted.

Where there is a material issue identified by the Petitioner and called out by the Appellate Court in its original review of this case, may the trial court ignore that issue?

3. The trial court erred in failing to arrive at findings of fact regarding the likelihood of the Respondent seeking to relocate the child, away from the father, if Respondent is granted primary residential status.

Where the Appellate Court has required the trial court to undertake an independent review of the case, may the trial court simply attach an analysis of the seven enumerated factors to an undisturbed earlier decision?

4. The trial court erred in its interpretation of the Appellate Court decision of May 2012, in failing to carry out the Appellate Court

mandate to undertake an independent review of the issues. is granted primary residential status.

Where the trial court has made a substantive factual error upon which its decision is partially based, may its decision be reversed?
5. The trial court erred in basing its ruling regarding primary residential status on a factual error--that the Petitioner did not have overnight visitation with the child.

The trial court equated the amount of time spent with the child, by virtue of the Respondent's unemployed status and assignment as primary parent during the temporary plan, with the quality of the bond with the child. Does the length of time spent with a child equal the strength, nature and stability of the relationship with the child?
6. The trial court erred in equating length of time spent with the child to the bond with the child.

The Petitioner submitted written materials addressing major issues material to the case. May the trial court simply ignore such materials?
7. The trial court erred in its failure to consider written materials submitted that provided evidence as to Respondent's efforts to restrict visitation by the father; the mother's failure to perform parenting functions; the abusive use of conflict by the mother; and the February 4, 2009 declaration regarding Respondent's domestic violence.

Where the trial court has, in 2009, conducted a proceeding that the Appellate Court has determined did not address the required enumerated factors, and that was structured specifically and only to address child support and visitation, to the exclusion of consideration of primary residential status, can the trial court correct that process simply through adding "closing statements" by the parties?
8. In response to the Appellate Court's remand for an "independent judgment" on primary residential designation, the trial court erred in constructing a process that was based on a flawed 2009 proceeding.

Trial court awarded attorneys fees to Respondent based on a motion that Respondent's counsel filed that was in violation of the court's local rules; the attorney's fees were awarded because the

Petitioner had filed a motion for revision as a means of preserving the court's error for purposes of appeal. Where the trial court has provided no means for objecting to a ruling other than filing a request for reconsideration, and where the Respondent's motion is improperly filed, may the trial court award attorney's fees against the Petitioner?

9. The trial court erred in its award of attorney's fees to the Respondent's attorney in response to Petitioner's Motion for Revision of October 18, 2012.

STATEMENT OF THE CASE

The initial trial proceeding in this case occurred in December 2008, in the court of Judge Sergio Armijo, (Armijo VRP 12/02/08 p1-97) After days of trial, the court indicated its readiness to make a decision, and an intent to award extensive overnight visitation to the Petitioner (Armijo VRP 12/08/08 p31-32). The Respondent, acting pro se, intervened with an assertion that the child suffered from a childhood illness, and that overnights with the Petitioner were contrary to medical advice(Armijo VRP p36-37). As a result, the court agreed to withhold action until April 2009 to allow for further medical evaluation, and declined to provide for overnight visitation for Petitioner, but provided continued temporary visitation pending final action (Armijo VRP p39,41). The case was transferred to the court of Judge Hickman, who, in preliminary proceedings, awarded overnight visitiation, admonishing the Respondent that she would have to provide direct reports from medical sources in support of a challenge to overnights for the

Petitioner. (Hickman VRP 03/06/09 p43) Respondent could provide no such reports. (Hickman VRP 09/16/09 p372-374)

At the September 2009 trial in Judge Hickman's court, Respondent claimed that the Armijo Court had made a final decision on custody, awarding custody to the Respondent. (Hickman VRP 09/15/09 p275) Judge Hickman agreed, and confirmed a custody award to the Respondent, indicating that a final decision on custody had already been made by Judge Armijo. (Hickman VRP 10/09/09 p532) Petitioner appealed to District II.

In May 2012 the Appellate Court ruled that the trial court had erred in treating the action of the Armijo Court as a final decision and in failing to consider the seven enumerated factors of RCW 26.09.187 (3)(a) (i-vii), reversed the decision of the trial court, and required the trial court to use its independent judgment in coming to a decision on primary residential placement, based on RCW 26.09.187 (3) (a)(i-vii). (Appellate Decision, CP 254-257 p2, 13,14-15) Appellate Court directed the trial court to enter a final child support order. On remand, the trial court directed the parties to provide financial information, including worksheets to the court, (VRP 06/15/12 p11) and indicated that the Court would schedule a proceeding to consider that information in making a decision on child support. (VRP 06/15/12 p12-14) The Court also indicated it

would accept input from the parties as to how it should structure a process to address the seven enumerated factors. The court eventually indicated that it would hold a proceeding allowing each side to make "closing arguments"; each side would have 40 minutes to address both child support issues, and argument in support of primary residential designation. (VRP 08/03/12 p11) That proceeding occurred on September 14 2012 (VRP 09/14/12). On October 8, 2012, the Court issued Amended Findings of Fact and Conclusions of Law which confirmed the Court's 2009 ruling awarding primary residential designation to the Respondent. (CP 103-109 p6) The current appeal is based primarily on that ruling. The appeal also challenges the award of attorney's fees for Petitioner's motion for revision. (Motion for Revision, CP 322-324)

ARGUMENT

1. Trial court erred in concluding that the length of time spent by the Respondent with the child as primary residential parent during the tenure of the temporary parenting plan, supports granting primary residential placement to the Respondent.

At the September 14 2012 hearing, the Respondent testified that she had been the primary caregiver for TBR since birth; that she had been unemployed in 2009 and therefore available to TBR (VRP 9/14/12 54). On October 8, 2012, Judge Hickman rendered his decision, affirming his original position in the 2009 Parenting

Plan that awards primary residential placement with the mother. (CP 103-109 p6) The court provided an analysis based on RCW 26.09.187 (3) (a) (i-vii).

"At the time of the original petition for establishment of a parenting plan and the child thereon, the minor child was approximately two years of age. The mother had been the primary parent since birth, and the Petitioner...had been granted periodic visitation with said child. This Court finds, at the time of trial, the the child had a much more bonded relationship with the mother than the father due to the lack of consistent visitation." (CP 103-109 p3) "At the time of the trial, again, the majority of the parenting functions had been performed by the Respondent due to the limited contact that the father was provided prior to the September 2009 trial." (CP 103-109 p4) "The child had been fulltime with the mother and there was no evidence to indicate that there was not a strong bond between mother and child or that she did not perform her normal parenting functions." (CP 103-109 p4)

The court ruling relies upon the fact that the mother had been "primary since birth" as the foundation of its ruling--that, in that time--through the tenure of the temporary parenting plan, the mother would have developed a stronger bond with the child than the father. The ruling does not indicate that the testimony and materials provided demonstrate the strength, nature and stability of the relationship with the Respondent was greater than that with the Petitioner, based on testimony and materials presented (CP 103-109)--other than that it was longer. Nor does the ruling assert that testimony or materials presented favor the Respondent in the other enumerated factors of 26.09.187 (3) (a) i-vii. (CP 103-109)

However, the State Supreme Court was clear in its Kovacs decision as regards reliance on the fact of status as primary caregiver during the period prior to the conclusion of a final parenting plan (Marriage of Kovacs, 121 Wn.2d 795, P.2d 629 July 1993).

"It is thus clear from the legislative history that the Legislature not only did not intend to create any presumption in favor of the primary caregiver but, to the contrary, intended to reject any such presumption".
"The Parenting Act of 1987 (Laws of 1987, ch. 460) does not create a presumption in favor of placement with the primary caregiver."

The legislative history adds weight to the understanding that the Legislature thought clearly about the idea of preference for the primary caregiver, and rejected it in favor of specific criteria to be considered by the court. The Supreme Court, in its Kovacs decision, relates how the early version of the bill that eventually became 26.09.187, originally contained language granting the primary caregiver preference--but that the Legislature, purposefully and intentionally, removed such language, and replaced it with what is now 26.09.187 (3) (a) i-vii. (Marriage of Kovacs, 121 Wn.2d 795, P.2d 629 July 1993). In relating this history, the Supreme Court is rejecting the preference for the primary caregiver. It is saying that there are two things, separate and distinct: one is the primary caregiver preference, one is the seven enumerated factors. One--the seven enumerated factors--is

endorsed by the legislature--and subsequently, by the Supreme Court; the other is rejected.

If there were any remaining question, state law is explicit:

"In entering a permanent parenting plan, the court shall not draw any presumptions from the provisions of the temporary parenting plan." RCW 26.09.191 (5)

In order to avoid just the outcome of having this trial court rely on the temporary plan, and the Respondent's status as primary residential parent during the tenure of the temporary plan, this Appellate Court, in its May 2012 decision in this case, was specific in admonishing to trial court against such rationale:

"Temporary parent plans are designed to maintain the status quo and drawing any presumption of parental fitness from the temporary plan is inappropriate. " (Appellate Decision, CP 254-257 p15)

The trial court, however, ruled otherwise. "The mother had been the primary parent since birth, and the Petitioner...had been granted periodic visitation with said child. This Court finds, at the time of trial, the the child had a much more bonded relationship with the mother than the father due to the lack of consistent visitation." (CP 103-109 p3) The trial court goes on to reference that there was no evidence proving the lack of a bond between the mother and the child. ""The child had been fulltime with the mother and there was no evidence to indicate that there was not a strong bond between mother and child or that she did not perform

her normal parenting functions." (CP 103-109 p4) The assertion that there was no evidence to prove the negative cannot be taken to mean that there was evidence to prove the positive--which positive evidence of the seven enumerated factors must, according to the Legislature, the Appellate Court and the Supreme Court, be the basis of the trial court's finding. The court's decision cites no such positive evidence in favor of the respondent. (CP 103-109)

The trial court's finding in this case is especially ironic in light of the narrative arc of the case. Petitioner asked the court repeatedly for overnight visitation over the course of the first two years (Proposed Residential Schedule 5/21/2008 CP 112-120) (Motion and Affidavit, 10/10/2008 CP 141-177)(Second Motion for Revised Temporary Residential Schedule 11/05/2008 CP 178-225) (Proposed Resdiential Schedule Revised 1/22/2009 CP 232-244); Respondent resisted each such request (Affidavit/Declaration of Respondent 7/23/2008 CP 121-140)(Delaration of Catherina Brown 11/13/08 CP 226-231)(Affidavit/Declaration of Respondent 2/2/2009 CP 245-253). At the December 2008 trial, Judge Armijo was prepared to grant Petitioner extensive overnight visitation (VRP 12/08/08 p32); Respondent declared to the court that the child was afflicted with a disease, and because of that no change to her overnight schedule should be allowed (VRP 12/08/08 p36)--

and Judge Armijo accepted that declaration (VRP 12/08/08 p39)--but never came to a final decision on the case. (Appellate Decision, CP 254-257 p2, 13,14-15) Judge Hickman--two months later--granted overnights to Petitioner, (VRP 3/06/09 p43-45) in spite of the attempt by Respondent to repeat the declaration of illness of the child, and the consequent inappropriateness of allowing overnight visitation. Judge Hickman asked for documentation from medical authorities--Respondent could never provide any. Respondent claimed at the start of the trial in September 2009 that Judge Armijo had already decided custody, and the only thing remaining was child support and visitation--and attorney's fees (VRP 9/15/09 p269). The entire time, the Respondent refused the orders of numerous courts, to change the birth certificate to include the father's last name--and she remains in defiance of the court in that regard today.(Appendix 1, 3rd page) The Appellate Court directed the trial court to correct the process--five years after this irregular process began. The entire time, Respondent was assigned primary residential status through the various proceedings described above, accumulating calendar time with the child tied to each delay. It is ironic that the Respondent asks the court to reward her for these distractions; it is an unreasonable ruling for

the court to grant her primary residential status based on this history.

These methods are examples of the approaches that the Legislature sought to avoid with its Parenting Act of 1987. According to the Supreme Court, Washington's Parenting Act

> "represents a unique legislative attempt to reduce the conflict between parents who are in the throes of a marriage dissolution by focusing on continued "parenting" responsibilities, rather than on winning custody/visitation battles". (Marriage of Kovacs, 121 Wn. 2d 795, P.2d 629 July 1993)

Rather than carrying out the intent of the Act, the trial court's actions have the opposite effect, rewarding these methods through its grant of primary residential status. The trial court's decision is based on a fundamentally wrong theory--that the designation as custodial parent during the temporary plan supports the designation as custodial parent for purposes of the final parenting plan. A judgment arrived at by means of a fundamentally wrong theory and lacking any findings supporting the proper theory may be reversed on appeal. 86 Wn.2d 156, Local Union 1296, International Association of Firefighters v. City of Kennewick. The Appellate Court reviews a trial court's ruling on placement of children for an abuse of discretion. Marriage of Kovacs, 121 Wn.2d 795, 801,854 P.2d 629. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Kovacs, 121 Wn.2d at 801.

The trial court's decision is clearly based on untenable grounds. In basing its decision on the fact that the Respondent was the primary caregiver since birth, the Court used a rationale that is contrary to Supreme Court precedent, to specific legislative intent as expressed in state law and in legislative history, and to the clear words of the Appellate Court in its May 2012 decision. (Appellate Decision, CP 254-257 p2, 13,14-15) The action of the trial court represents an abuse of discretion, and should be reversed, and primary residential status awarded to the Petitioner.

2. The trial court erred in its judgment that the Respondent established that a greater bond existed between her and the child than between the Petitioner and the child; The trial court further erred in accepting, and in repeating in its judgment, that the Respondent had established a greater bond with the child because she had been the primary parent since birth--when the court had specifically required that no information regarding the period prior to December 2008 would be accepted.

In its October 8, 2012 decision, the trial court provided an analysis based on RCW 26.09.187 (3) (a) (i-vii).

"At the time of the original petition for establishment of a parenting plan and the child thereon, the minor child was approximately two years of age. The mother had been the primary parent since birth, and the Petitioner...had been granted periodic visitation with said child. This Court finds, at the time of trial, the the child had a much more bonded relationship with the mother than the father due to the lack of consistent visitation." (CP 103-109 p3) "At the time of the trial, again, the majority of the parenting functions had been performed by the Respondent due to the limited contact that the father was provided prior to the September 2009 trial." (CP 103-109 p4) "The child had been fulltime with the mother and there was no evidence to indicate that

there was not a strong bond between mother and child or that she did not perform her normal parenting functions." (CP 103-109 p4)

The ruling was based, according to the decision, on a September 14, 2012 hearing and on written materials submitted. (CP 103-109 p2) The trial court required, at that hearing and in materials presented, that only the period between the end of the 2008 first trial in the Armijo court, and the September 2009 trial in the Hickman court, would be addressed in oral presentation and in materials submitted; nothing that preceded or followed those dates would be allowed (VRP 9/12/12 P15).

At the September 14 hearing, Petitioner presented evidence summarizing the testimony and documents from the 2009 proceeding in Judge Hickman's court regarding his parenting, testified to by witnesses that knew him personally over decades, and who had seen his relationship with TBR develop. (VRP 9/14/12 38-46) This testimony was extensive, detailed, and specific. It described TBR's reliance on Reed as a steady base, the nurture that he provides to her, how the relationship has brought him joy, how he has been a model parent, how parent and child seem to have fun together. Of particular note is the testimony of Dr. Christin Larue, (VRP 9/14/12 39) which Petitioner summarized, a bonding expert that had been qualified by the court

as an expert witness at the 2009 trial.(VRP 9/15/09 p200) Her testimony had been based on a series of three visits with Petitioner and TBR over several years, and had been the subject of several reports submitted to the court and received as evidence in the 2009 trial. Her testimony addressed Petitioner's nurturing the child, taking care of the child's needs, both physical and emotional. (VRP 9/14/12 39) She concluded that petitioner was very nurturing, speaking to the nature of the relationship. Structure was also addressed, and she concluded Petitioner did a great job with structure, speaking again to the nature of the relationship. (VRP 9/14/12 40) Engagement was described, and Dr. Larue described TBR as very engaged by Petitioner, speaking to the strength and stability of the relationship (VRP 9/14/12 41). Challenge was the fourth element assessed, and Petitioner was described as doing a good job of providing an appropriate challenge, speaking to the strength and nature of the relationship (VRP 9/14/12 42). According to Dr. Larue, Petitioner's relationship with TBR had deepened and grown, and TBR showed a secure attachment to her father, speaking further to the strength and stability of the relationship (VRP 9/14/12 43). She was described as utilizing him as a secure base, speaking again to the strength and stability of the relationship (VRP 9/14/12 43).

Respondent presented no testimony regarding the strength, nature or stability of her relationship with TBR. All of her testimony had to do with 1) providing financials requested by the court (VRP 9/14/12 50); 2) the length of time that the mother had been the primary caregiver during the various iterations of the temporary plan (VRP 9/14/12 52); 3) the granting of overnight visitation to the father by the court; 4) references to GAL reports regarding incidents that preceded the December 2008 allowable testimony cutoff (VRP 9/14/12 53), 5) the Respondent's unemployed status, and her presumed freedom to spend time with the child given that status (VRP 9/14/12 54) . Respondent's failure to offer evidence in support of the strength, nature and stability of her relationship with the child, in contrast to the extensive evidence to that effect offered by the Petitioner, renders untenable any decision by the court to find that she demonstrated a stronger strength, nature and stability relationship with the child than did the petitioner. The ruling further relies on the fact that the Respondent was unemployed as evidence of a stronger bond. "At the time of the hearing in September 2009, the Court does not believe the mother was employed, and therefore, had availability to provide almost fulltime care for the child." This is incorrect on two counts: first, the Respondent was the sole proprietor of a business, (VRP

9/16/09 p429-430, 438) and second, even had she been available to spend time with the child, no evidence was offered to demonstrate that she made the choice to spend such available time with the child. The Appellate Court reviews a trial court's ruling on placement of children for an abuse of discretion. Marriage of Kovacs, 121 Wn.2d 795, 801,854 P.2d 629. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Kovacs, 121 Wn.2d at 801. The trial court's decision is clearly based on untenable grounds.

Additionally, in asserting that she has been custodial parent since the child's birth, and has thus had opportunity to build a stronger bond with the child (VRP 9/14/12 52), Respondent is clearly in violation of the trial court's established rules for testimony and evidence allowed; the Court clearly, and on numerous occasions indicated that any information regarding the period before the end of the 2008 trial (the child was born in February 2007) would not be allowed (VRP 9/14/12 p12)(VRP 8/3/12 p9). Referring to the period "since the child's birth" clearly precedes that cutoff. Court Rule ER 104 gives the court authority to rule on admissibility of evidence :

> Questions of Admissibiity Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibiilty of evidence shall be determined by the court...." ER 104

Once having made such ruling, the Court must apply it in an evenhanded manner. Rather than ruling such testimony inappropriate, the court instead included explicitly that language in its ruling of October 8 2012 ("Mother had been the primary parent since birth and the Petitioner, Mr. Reed, had been granted periodic visitation with the child") (CP 103-109 p3)--after requiring that no such testimony would be allowed. When Petitioner attempted to object to Respondent testimony in violation of the Court's ruling, the trial court refused to accept the objection, and indicated that it would not be accepting any objections, depriving Petitioner of opportunity to preserve error for purposes of appeal. (VRP 9/14/12 p52) Petitioner requests that the Appellate Court disqualify testimony regarding the period before December 2008, consistent with the trial court's procedural ruling; and that any portion of the trial court's ruling that relies on, or refers to, the Respondent's care for the child prior to December 2008 be reversed. The entire ruling, in fact, relies heavily on the fact that the mother has been the primary custodial parent since birth. Without such provision, the trial court has cited no basis upon which to award custody to the Respondent, and Respondent has offered none. (CP 103-109)

Petitioner requests that the Appellate Court reverse the award of custody and grant it to Petitioner.

Petitioner supplemented his testimony with material submitted in writing on 9/19/12. (Notice of Case Summary and Attachments, CP 282-321) It detailed the 2009 testimony related to the seven enumerated factors, including an Attachment A, which provided a comparative analysis of the testimony given by the respective parties in 2009, side by side. (Notice of Case Summary and Attachments, CP 282-321, 19th page) This comparative analysis revealed 2009 testimony in favor of the Petitioner on strength, nature and stability issues, that heavily favored the Petitioner both in terms of quantum of evidence, and was overwhelmingly in favor of the Petitioner in terms of depth, richness, detail, analytical quality, and specific relationship to the enumerated factors. Respondent provided no supplemental information in writing to the Court.

Though the trial court addressed the matter of which parent had held primary custody during the period of the temporary plan, the court does not address the matter of which party demonstrated, by testimony and materials submitted, the greater strength, nature and stability of the relationship with the child. (CP 103-109) The length of time that a parent spends with a child is a fundamentally

different thing than the strength, nature and stability of the relationship with the child, and a finding addressing the length of time spent cannot be said to address the strength, nature and stabiity of the respective relationships with the child. Proxy factors do not meet the requirements of the law. The findings were completely silent on the extensive, rich and detailed information submitted by the Petitioner on the seven enumerated factors, including the strength, nature and stabilty of his relationship with the child. (CP 103-109) A trial court must enter findings of fact on all material issues in order to inform the appellate court of what questions were decided and the manner in which they were decided. 125 Wn.2d 413, Federal Signal v. Safety Factors. The Appellate Court reviews a trial court's ruling on placement of children for an abuse of discretion. Marriage of Kovacs, 121 Wn. 2d 795, 801,854 P.2d 629. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Kovacs, 121 Wn.2d at 801. The trial court's decision in this case, based simply on the input received in the proceeding that it designed and managed, together with written materials, is manifestly unreasonable, in that it directly contradicts the character, weight and quality of evidence provided. Petitioner provided extensive, rich and compelling evidence directly

addressing the enumerated factors (Notice of Case Summary and Attachments, CP 282-321); Respondent provided none. It is further unreasonable in that it accepts, relies on, and repeats in its ruling, testimony from the Respondent that is in direct violation of the trial court's ruling regarding admissible input. It is unreasonable for the trial court to conclude in the favor of the party who has provided little or no testimony or evidence that speaks directly to the enumerated factors, in support of its position; in the absence of supporting testimony or documentation, and in its reliance on testimony that violates the court's ruling regarding admissible evidence, the unreasonableness of the court's decision constitutes an abuse of discretion.

3. The trial court erred in failing to arrive at findings of fact regarding the likelihood of the Respondent seeking to relocate the child, away from the father, if Respondent is granted primary residential status.

The seven enumerated factors include several that underline the importance of continuing and extending the child's opportunity for development of her relationship with her father, as well as with her surroundings. RCW 26.09.187 (3)(a) i-vii Yet the Respondent has made it clear that there is significant likelihood that she intends to relocate with the child if she is awarded primary residential status. In materials presented to the court to supplement oral testimony, Petitioner summarized testimony provided by the Respondent

addressing her intent to relocate (Notice of Case Summary and Attachments, CP 282-321 6th page)) (VRP 9/16/09 P 350) (VRP 9/16/09 P 351) (VRP 9/16/09 P 440)

Why have you not been employed since October of 2008?

Brown: My position was eliminated at Space Labs healthcare due to the recession and the budgets, and its been difficult to find work locally. I have received offers outside of the state of Washington for several positions, but due to this litigation, have been unsuccessful in accepting the position

Brown: In terms of my career, with the recession, it will be tough to go back and have a position that I've grown accustomed to, especially in Washington state since there's not many positions here. Being out of my field, research, when new technology goes on--and its quick and rapid--for almost a year is a bad thing. THE COURT: Counsel, I just want to make it clear: is this a relocation trial?(VRP 9/16/09 P 350).

Brown: I hope to be able to find employment. I look on a daily basis locally for a job. I'm either told that I'm over-qualified for a position, or due to budget cuts that they're not hiring. Currently some research projects have been halted by the pharmaceutical and the bio-med companies locally.

So you're not intending to take the child and try to move out of state on purpose?

Brown: Gosh, no. I relocated my parents here so they can be close to me, so moving out of state is not my first option. However, its difficult to find work here, and I need to be able to feed myself and my daughter. (VRP 9/16/09 P 351).

Tell me all of your out-of-state travel for 2009.

Brown: It's all here in the deposition.

Tell me all your out-of-state travel for 2009.

Brown: January 2009, I went to a job interview.

Where did you go?

Brown: California

And how long were you gone?

Brown: Two days. (VRP 9/16/09 P 440)

At the time of the 2009 trial, Brown's clear intent was to seek work out of state and actively consider relocating with the child. These proceedings had originally been initiated by the Petitioner in 2007 when, in fact, the Respondent had purchased a plane ticket to take the child to Chicago where the Respondent had a job waiting. (Armijo VRP 12/04/08 p140-143) That intent was transparent to the Appellate Court, which, in its May 2012 decision, said "Accordingly, in light of Brown's asserted desire to move her and THB to Chicago, it is especially important that the trial court carefully consider all the enumerated factors in RCW 26.09.187 (3)(a) in determining THB's primary residential parent." (Appellate Court ruling, CP 254-257 p16) Yet there is no indication that the trial court has considered this matter. The findings and conclusions of the court in its October 8 2012 judgment are completely silent on this issue, (CP103-109) in spite of the detailed material summarized above that was submitted to the trial court. (Notice of Case Summary and Attachments, CP 282-321 6th page)) A trial court must enter findings of fact on all material issues in order to inform the appellate court as to what

questions were decided on by the trial court, and the manner in which they were decided. 125 Wn.2d 413, Federal Signal v. Safety Factors.

Several of the enumerated factors of 26.09.187 (3) (a) i-vii are relevant to the question of relocation of the child. In addressing the strength, nature and stability of the respective relationships, Factor i.) underlines the importance of stability in the child's circumstances. There can be few greater instances of instability than tearing the child from her father, from established relationships, from sources of stability and nurture--few greater examples than the removal of the child from the state as clearly intended by the mother. Factor v.) addresses the child's relationships with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities. To abruptly relocate the child, away from father, family, friends, school, support networks, recreational and developmental pursuits--clearly would be against the best interests of the child, and would be contrary to this factor. In her brief life, TBR has become a very good skier in excursions with father through trips to Crystal Mountain; they also frequently kayak on Puget Sound. She also enjoys bicycling King County's Regional Trails System, which provides car-free biking

opportunities; she has biked with her father hundreds of miles (he pulling her in a "third wheel") Those opportunities are unlikely to be available through a relocation. Factor iv.), the emotional needs and developmental level of the child, again requires the continuation of the support base that has grown around the child. As demonstrated by the testimony of Christin Larue, even at two TBR had come to see the father as a secure base, and showed a secure attachment. TBR has an attachment to her room at her father's home, and to the toys and items that he has provided her; she demonstrated "claiming" behaviors to these things, according to Dr. Larue. (VRP 9/14/12 p44) To remove her from this environment would clearly violate factor iv). In sum, the enumerated factors argue that, where there is a clear likelihood of removal of the child from the state by one parent, that any reasonable analysis of the seven enumerated factors by the court must show some level of consideration of this question, in order to demonstrate a meaningful analysis. The appellate court so admonished the trial court. (Appellate Court ruling, CP 254-257 p16) Yet the trial court's analysis reflected no consideration of this matter. The failure to address the matter is contrary to the court's precedent in Federal Signal v. Safety Factors, and is thus untenable. A trial court must enter findings of fact on all material

issues in order to inform the appellate court as to what questions were decided on by the trial court, and the manner in which they were decided. 125 Wn.2d 413, Federal Signal v. Safety Factors. The Appellate Court reviews a trial court's ruling on placement of children for an abuse of discretion. Marriage of Kovacs, 121 Wn. 2d 795, 801,854 P.2d 629. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Kovacs, 121 Wn.2d at 801. The trial court's action to ignore the Appellate Court's direction to give consideration to this question is manifestly unreasonable, and constitutes an abuse of discretion.

4. The trial court erred in its interpretation of the Appellate Court decision of May 2012, in failing to carry out the Appellate Court mandate to undertake an independent review of the issues.

In its May, 2012 decision, the Appellate Court reversed the trial court's designation of primary residential parent, and remanded to the trial court to "make its own independent determination on this issue". (Appellate Decision, CP 254-257 p13) At the September 2012 proceeding, Petitioner described to the trial court in detail the unfortunate process (VRP 9/14/12 p 23)that led to the trial court's understanding--relying on input from the Respondent--that the Armijo Court had made a final decision on custody. Rather than construct a process to correct that error that would reexamine the

assignment of primary residential status, utilizing the seven enumerated factors--the trial court's comments suggest that it intended to simply attach the seven factors to its original decision. There is nothing in the record indicating that the trial court undertook a review of its 2009 court proceedings that led to the Appellate Court reversal. The trial court, on remand, appears to see its responsibility as simply attaching to its original decision, language addressing the seven factors:

> THE COURT: The other issue was the fact that I needed to make Findings of Fact and Conclusions of Law, I believe, in regards to the decision that I made. They were not disputing my parenting plan, but they -- because the Findings of Fact and Conclusions of Law were not entered at the time as to why or what the basis was for my parenting plan, they wanted me to do Findings of Fact and Conclusions of Law.
> I will stand corrected by counsel since I was wrong on the memory of counsel, but I think the court wasn't requiring me to retry the case. It was just asking me to state a basis for the decision that I did make in terms of the parenting plan. (VRP 6/15/12 3)
>
> ...I think what I'm going to have to do is just simply look at the transcript and come up with some Findings of Fact and Conclusions of Law as to why I did what I did, unless I'm misinterpreting the Court of Appeals decision about retrying that issue (VRP 6/15/12 4).
>
> ...So far, other than the child support order, I'm trying to find where the Court of Appeals wanted me to do something regarding the parenting plan (VRP 6/15/12 7).
>
> ...I know it tells me I need to go back and incorporate these into a decision because I didn't articulate 26.09.187(3)(A) factors.
> "In regards to the -- I think it's clear from the Court of Appeals that they want me to enter Findings of Facts and Conclusions of Law, based on the RCW submitted, as to why I entered the parenting

plan that I did based on hearing the evidence I did (VRP 6/15/12 11).

"I think anything that's happened since I made my initial ruling is potentially grounds for a modification if there's enough there to get through adequate cause, but there's no directive from the Court of Appeals to me to reopen and re-discuss anything that's occurred from the date of decision till now. That's grounds for potential modification. By saying that, I make no judgment on that one way or the other, but that to me would be the proper basis to go forward." (VRP 8/3/12 P10).

"Number two, I'm going to allow what I would call another closing argument because I did not ask you folks to analyze those factors when you were before me because the Court was under the mistaken process that Judge Armijo had made a final decision and simply set it for what I would call an extensive review hearing, but I'm not going to argue with the Court of Appeals. I'm going to follow their direction, but I see nothing here that orders me to reopen the case. I think that would be improper, but I think it is fair that both of you have the opportunity to argue the seven factors..." (VRP 8/3/12, p11)

However, simply attaching a rationale after the fact of the decision falls short of the Appellate Court's direction. Judge Hickman, in 2009, understood wrongly that Judge Armijo had made a final decision in the case; to attach findings and conclusions to a decision which he never made--and which in fact, was never made by any court--is clearly untenable. The Appellate Court ruled that the Armijo Court did not make a final decision. (Appellate Decision, CP 254-257 p2, 13,14-15) The Appellate Court's reversal of the custody designation clearly placed the decision process at the starting point. The trial court's assumption that the Armijo Court did make a final decision, and the choice to simply affirm a decision that was not made in its 2009 ruling, left the case

in a no-decision status. An after-the-fact rationale in support of a no-decision, falls short of the Appellate Court's direction to the trial court to make an independent judgment based on the seven enumerated factors.

Moreover, the trial court addressed the respective issues of child support and primary residential custody in a fashion that is highly suggestive of a predetermined decision on primary residential designation. Any decision on child support is necessarily contingent on a ruling on custody; that is, the non-custodial parent pays the custodial parent. Worksheets, for example, explicitly require an understanding of which parent is to be primary residential parent, in order to complete the required information entries and to perform the calculations. To the extent that the court signals that it will require information on financial status related to child support, such as worksheets, prior to or contemporaeous with determining primary residential status, it is signalling that there is an assumption in place regarding primary residential placement--and that the parties should prepare worksheets based on that assumption. The record provides no evidence--through court comment, through timing of requirements for financial documents, or otherwise--that the court considered that it would need to make

a decision on primary residential status before making a decision on child support:

"Well, here's what I'm going to do. First of all, I've got to enter a child support order. I'm not going to enter it as to their financial conditions currently. I have to go back as if the support order was going to be entered on the day of trial. So, at a minimum, I want you each to provide me with paystubs and worksheets and financial information that you want me to consider in regards to making a child support order. I chose to keep the 2007 order in place. My problem was I didn't have anyone draft up an order reflecting that at the time...
...In regards to the--I think its clear from the Court of Appeals that they want me to enter Findings of Fact and Conclusions of Law...as to why I entered the parenting plan that I did based on hearing the evidence that I did..."(VRP 6/15/2012 p11)

Almost two months later, on August 3, 2012, the court defined how it would manage the requirement to address the seven enumerated factors. (VRP 8/3/12, p11) The discussion of child support came almost two months before the trial court had made a decision on--or even made a decision on the process that it would utilize to address--the Appellate Court's requirements regarding primary residential status. (VRP 6/15/2012 p11)

Further evidence of the court's disinclination to come to an "independent judgment" as regards the issue of primary residential designation comes in its treatment of events and evidence for the period following the 2009 ruling. There was a period of more than two years between the November 2009 ruling of the trial court, and the May 2012 decision of the Appellate Court, which remanded the case back to the trial court. Where there is a final ruling in place,

state law (RCW 26.09.260) provides for a process whereby, when there is a substantial change in conditions, a non-custodial parent may seek a modification in the parenting plan, after having demonstrated that such substantial change has occurred. That process is confined specifically to cases where a final parenting plan is in place.

RCW 26.09.260 "...the court shall not modify a prior custody decree or a parenting plan unless it finds, upon the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interest of the child...."

Yet the trial court, in describing how the parties were to address events and developments after the trial court's 2009 ruling, indicated that the parties had access to the "modification" process addressed by the code.

"I think anything that's happened since I made my initial ruling is potentially grounds for a modification if there's enough there to get through adequate cause, but there's no directive from the Court of Appeals to me to reopen and re-discuss anything that's occurred from the date of decision till now. That's grounds for potential modification. By saying that, I make no judgment on that one way or the other, but that to me would be the proper basis to go forward." (VRP 8/3/12 P10).

The court's reliance on this section of code indicates the court's understanding regarding the circumstances under which such modification proceedings apply--where there is a prior custody decree or parenting plan in place. This approach strongly suggests that the trial court undertook to proceed on the assumption that a

final decision was in place, and its only role was to attach an enumerated factors analysis to such decision.

The Appellate Court should consider the context of these Conclusions of Law reached by the trial court. The Appellate Court has confirmed that the trial court, in its 2009 consideration of this matter, did not consider the seven enumerated factors in its decision process at that time. (Appellate Decision, CP 254-257 p2, 13,14-15) Further, the trial court in 2009 specifically defined the parameters of the case to be about child support, visitation, and attorney's fees by granting the respondent's motion in limine, which asserts

"In these orders, respondent was named the custodial parent. The issues reserved for the return trial are petitioner's visitation times with the child. The issues before this court should be a permanent parenting plan for the child Tuscany addressing the petitioner's amount of visitation with the child and a Final Order of Child Support." (CP 1-30, P3)

The court's September 16, 2009 order granting the motion in limine (CP 31) effectively defined the parameters of the 2009 trial.

It is clear from the comments of the trial court that it never embraced the Appellate Court's direction to reach an "independent judgment" regarding primary residential designation--but rather constructed a rationale intended to attach a discussion about the enumerated factors to an existing, undisturbed ruling. It is appropriate for the Appellate Court, in light of the untenable,

unreasonable actions of the trial court, to reverse the trial court's ruling, to apply the law as required, to implement its May 2012 ruling requiring application of the seven enumerated factors, and to award the Petitioner primary residential status.

5. The trial court erred in basing its ruling regarding primary residential status on a factual error--that the Petitioner did not have overnight visitation with the child. The court further erred in indicating that there was no impairment of the Respondent's performance of parenting functions.

The trial court's October 2012 decision is based heavily on the understanding of the predominance of time that the respective parents had with the child. The Court notes as follows in its decision:

"Mr. Reed, as a result of concerns regarding health issues (sensory integration), had not had overnight visitations for any substantial period and had seen the child mostly on day visits only." (CP 103-109, p3)

In March of 2009, after years of requests, the trial court awarded the Petitioner overnight visitation on alternating Tuesdays, and Saturday overnight to Sunday evenings on alternating weekends. (VRP 03/06/09 p43) It is incorrect to indicate that Petitioner had not had overnight visitations for any substantial period and had seen the child mostly on day visits only. To the extent that the trial court's ruling relies on this factual error, the ruling is untenable.

The court further ruled as follows:

"There was nothing brought to the attention of the Court, or a finding made by the Court, that the mother's past, present or future performance of the parenting functions would be impaired in terms of the child's daily needs."

In fact, there was testimony from the Respondent's witness, the Marybridge Occupational Therapist Dianna Bamboe that TBR should have been enrolled in occupational therapy, and that the mother failed to do so (VRP 9/16/09 p409-410) (VRP 9/16/09 p404-405)(VRP 9/16/09 p413). The Court later questioned the witness on this point (VRP 9/17/09 476-478), but was skeptical regarding the response

"Ms. Brown's attention to this issue is in itself inconsistent. In the spring of '09, it was important to keep the child in occupational therapy until enrollment in the Birth-to-Three program, but for some reason it was not as important in the summr of '09. The occupational therapist testified she would have expected the child to remain in occupational therapy pending enrollment and would have released her only with the expectation she sould start the program forthwith, not four months later. This Court does not find that there was any miscommunication on this issue as claimed." (VRP 10/09/09 p 536)

The court went further in its Findings of Fact: "There was no miscommunication, as was claimed by the mother, regarding her failure to keep the child enrolled in occupational therapy." The Respondent had asserted to the Court, and to Judge Armijo earlier, that the Sensory Integration issue was a childhood illness suffered by the child which served as a reason that the court should not allow overnights by the father, (Armijo VRP 12/08/08 p36-37)

(Hickman VRP 09/16/09 p372-374) and for which the occupational therapy regime, and the later Birth-to-Three visits, were required. "Parenting Functions" are defined as "those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child. Parenting functions include:....(b) Attending to the daily needs of the child, such as....health care" RCW 26.09.004 (2) (b). Based on the Respondent's testimony, the Court found that the Respondent had failed to provide appropriate treatment for the child, and had thus failed in the performance of parenting functions. The court's finding that "there was nothing brought to the attention of the Court, or a finding made by the Court, that the mother's past, present or future performance of the parenting functions would be impaired in terms of the child's daily needs."...is directly contrary to the court's own earlier finding, and to direct testimony by the Respondent's own witness. The Court's 2012 ruling on this matter is untenable, as being contrary to its earlier findings, and further in that it is inconsistent with the enumerated functions of RCW 26.09.187 (3) (a) iii " Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004 (3)". The court's ruling, in this light, constitutes an abuse of discretion.

The Appellate court reviews a trial court's ruling on placement of children for an abuse of discretion. In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable or is base on untenable grounds. The Appellate Court should reverse the trial court's ruling, and should award primary residential status to the Petitioner.

6. The trial court erred in equating length of time spent with the child to the bond with the child.

The trial court's decision includes the following language:

"The Court finds, at the time of trial, that the child had a much more bonded relationship with the mother than the father due to the lack of consistent visitation." (CP 103-109 p3)

The trial court is presuming, in its conclusion, that the quantum of time spent with a child equates directly with the bond with the child. But there are many relationships that continue for extended periods, but that feature weak, shallow, troubled or inconsistent bonds. There are also many relationships where the parties--parent/child, or otherwise--may see each other less frequently, but that are characterized by a strong bond. It is factually incorrect to assume that a longer relationship is a stronger relationship. The Supreme Court and the Legislature, for that reason, were exceedingly clear in enumerating the factors that must be

considered in awarding primary residential status; they must be the seven enumerated factors of RCW 26.09.187 3(a) i-vii. Some proxy for one or more of the factors--such as the amount of time spent, or the unemployed status of one parent--are not among the seven factors, and cannot be substituted. Petitioner raised this issue in his Motion for Revision of October 18, 2012;(Motion for Revision,CP 322-324) it was also raised in testimony on that motion on October 26, 2012 (VRP 10/26/2012 p2). A judgment arrived at by means of a fundamentally wrong theory and lacking any findings supporting the proper theory may be reversed on appeal. 86 Wn.2d 156, Local Union 1296, International Association of Firefighters v. City of Kennewick. Petitioner established by extensive testimony and evidence, in fact, that the strength, nature and stability of his relationship with the child were substantially greater than that between the mother and the child--despite improper efforts by the Respondent--as concluded by the trial court--to interfere with and restrict that relationship. (Findings of Fact 2.2, Appendix 2) The Appellate court reviews a trial court's ruling on placement of children for an abuse of discretion. In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds.

The trial court's reliance on a presumption that equates the calendar time of a relationship with the strength of a relationship results in a decision that is based on a flawed presumption, and is therefore manifestly unreasonable and untenable, and constitutes an abuse of discretion.

7. The trial court erred in its failure to consider written materials submitted that provided evidence as to Respondent's efforts to restrict visitation by the father; the mother's failure to perform parenting functions; the abusive use of conflict by the mother; and the February 4, 2009 declaration regarding Respondent's domestic violence.

On September 19, 2012, Petitioner submitted supplemental written materials addressing key issues pertaining to the period identified by the Court as appropriate for consideration. (Notice of Case Summary and Attachments, CP 282-321) The Petitioner described earlier court findings regarding the Respondent's efforts to limit standard visitation by the Petitioner . (Notice of Case Summary and Attachments, CP 282-321 29th page) That effort violates RCW 26.09.191 (3), indicating that such action may have an adverse affect on the child's best interests. There was no evidence presented contradicting this point. The materials further addressed earlier court findings confirming that the mother failed to address the child's health care needs through her failure to keep the child enrolled in occupational therapy, (Notice of Case Summary and

Attachments, CP 282-321 3rd page) and how that failure demonstrates the Respondent's performance regarding enumerated factor 26.09.187 (3) (a) iii, past and potential for future performance of parenting functions. There was no evidence presented contradicting this point. The materials further addressed an incident near Northgate Mall, demonstrating the Respondent's abusive use of conflict, and placement of the child in a position of extreme emotional stress. (Notice of Case Summary and Attachments, Northgate Incident CP 282-321 5th page)) There was nothing submitted contradicting this point. The materials further described a February 4, 2009 declaration to the court by the Petitioner addressing the Respondent's pattern of domestic violence against Petitioner. (Notice of Case Summary and Attachments, CP 282-321 8th page). There was no evidence presented contrary to this information. The provisions of RCW 26.09.191 require the court to restrict the provisions of the parenting plan where there is a pattern of domestic violence; the materials submitted demonstrate a pattern of incidents by the Respondent, occurring over time. The material further demonstrates the instability of the Respondent's lifestyle; and speaks to the enumerated factor 26.09.187 (3)(a)i, addressing the strength, nature and ***stability*** of the petitioner's relationship with

the child. (Notice of Case Summary and Attachments, CP 282-321, 9th page)) There was nothing submitted by the Respondent to contradict this information. The material further described, in tabular form, the significantly stronger testimony and evidence demonstrating the Petitioner's performance on the seven enumerated factors as compared to the Respondent's performance. (Notice of Case Summary and Attachments, CP 282-321 14th page) There was nothing submitted which contradicted this information. Finally, the material included a comparative analysis of the testimony and information relative to the parties' strengths as parents--demonstrating, again, the overwhelming weight in favor of the Petitioner regarding abilities as parent. Again, there was nothing presented by the Respondent to counter this. The court's findings, however, did not address any of this material.

8. In response to the Appellate Court's remand for an "independent judgment" on primary residential designation, the trial court erred in constructing a process that was based on a flawed 2009 proceeding.

The court, after hearing from both sides regarding structuring a process to address the requirements of the Appellate Court ruling, determined that each side would be given the opportunity for "closing arguments" to support the court's efforts at developing findings and conclusions that address the enumerated factors of

RCW 26.09.187. (VRP 8/03/12 p11) Basing the court's analysis on closing arguments to the 2009 proceedings, however, ties the analysis to a process that falls short of due process requirements. The 2009 proceeding was designed and managed to deal specifically, and only, with visitation and child support. " The court so ruled in its order affirming the Respondent's motion in limine.

" In these orders, respondent was named the custodial parent. The issues reserved for the return trial are petitioner's visitation times with the child. The issues before this court hould be a permanent parenting plan for the child Tuscany addressing the petitioner's amount of visitation with the child and a Final Order of Child Support." (CP 1-30, p3) "The court having heard argument on the Respondent's motion in limine, it is hereby ordered, adjudged and decreed that the motion in limine is granted..." (CP 31)

The court's oral ruling further confirmed the parameters of the case:

"One issue that was not reserved at issue is who's to be the primary parent for Tuscany. Ms. Brown was named in that role, and any changes in seeking a change in the primary custodian would require the filing of a modification petition after this date since the primary custodian issue was not reserved." (VRP 10/09/09 p532)

The proceeding assumed that the decision on primary residential status had already been made by Judge Armijo in his December 2008 trial. A proceeding which is designed and managed on a fallacious understanding, as ruled by the Appellate Court, cannot be said to be adequate to address the central issue at play between the parties--the matter of primary residential status designation.

The Appellate Court finding that the trial court process failed to address the requirements of RCW 26.09.187, is entirely consistent with the trial court's design of the process, which was specifically structured not to deal with primary residential status, and thus had no need of the seven enumerated factors. A 40-minute "closing argument" to such a proceeding almost three years later, falls far short of a proceeding designed to allow the parties to make a case for primary residential status--an opportunity that the trial court has never provided. A party structuring a case where the central issue is primary residential status will focus arguments specifically and heavily on the seven enumerated factors of 26.09.187 (3)(a)i-vii. Where the central issues are child support and visitation, a party would focus heavily on financial status of both parties to address child support matters. To address visitation matters, a party might focus on the importance of both parents in the child's life; of the kinds of supplemental benefits that could be provided to the child by having substantial time with the non-custodial parent; of the ability to cooperate with the custodial parent in day to day care for the child, and in joint decisionmaking; on willingness to relocate closer to the custodial parent for the convenience of the child. Any effort to demonstrate a sronger case regarding strength, nature and stability of relationship would be ill-placed where the

issue of primary residential status was already decided. In that light, the structure of the case in the 2009 trial would likely have been different had the matter of primary residential placement been before the court, rather than already decided by the Armijo proceeding. That difference denied the Petitioner the opportunity to appropriately prepare a case for primary residential status; combined with the opportunity to provide an additional "closing statement" three years later to an ill-structured original proceeding, the process falls far short of the requirements for a fair, balanced and reasonable proceeding.

Petitioner believes that the appropriate ruling by the Appellate Court would be to examine the trial court's decision based on the failure by the Respondent to make a case regarding the seven enumerated factors of 26.09.187 and on the trial courts errors identified in the Assignment of Error numbers 1-6; and to confirm that the Petitioner's evidence and testimony addressing these factors clearly justifies award of primary residential status, by the Appellate Court, to the Petitioner, and to make such award. The extended, tortured, mishandled process at the Trial Court level clearly supports such a ruling. The trial court has had several opportunities to correctly rule in this case, and has not

demonstrated the capacity or will to carry out the requirements of the Appellate Court.

If the Appellate Court does not so rule, however, Petitioner requests that the Appellate Court consider the due process shortcomings of the proceedings constructed by the trial court, and remand the case to the court with directions to conduct a new trial, with full opportunity for both sides to make their cases regarding primary residential status. While this alternative is only reluctantly offered, acknowledging the expense and stress to both parties, the 2009 process, and the 2012 "closing arguments", so little resemble a reasonably fair proceeding that any effort to redeem them would be patchwork at best, and would deny the child the transparent, fair and balanced proceeding that the law promises.

9. The trial court erred in its award of attorney's fees to the Respondent's attorney in response to Petitioner's Motion for Revision of October 18, 2012.

On October 8, 2012, the Court issued its Amended Findings of Fact and Conclusions of Law, confirming its earlier ruling on primary residential designation. (CP 103-109) The ruling was not issued with the parties present; the Court mailed the ruling to the Petitioner, who received it two days later (Pierce County's LINX system shows no court proceeding on October 8 2012). There was no opportunity to offer objection in person, requiring the Petitioner

to file a Motion for Revision to preserve error in case of appeal. Petitioner did so, filing such motion October 18, 2012.(Motion for Revision, CP 322-324) Petitioner emailed Respondent's attorney, on October 18th, providing her with a copy of the motion, and saying "Filed this morning. If this date is a problem, please let me know." (VRP 10/26/12 p13) Not hearing from the Respondent's counsel, Petitioner sent another email on October 22, four days later, asking her to confirm receipt, in that no response had been received. (October 2012 emails, Appendix 3) There was no response. (VRP 10/26/12 p13) Finally, Petitioner called Counsel's office, and the receptionist confirmed that she had received the email. The motion was set for the October 26, 2012 calendar. On the morning of October 26, before the 9 a.m. hearing, Petitioner happened to look at the Pierce County LINX system and, for the first time, saw that an Affidavit/Declaration of Respondent had been filed. (Affidavit/Declaration of Respondent, CP 327-331) Among other things, the Declaration requested $1500 in attorney's fees. Petitioner checked his email and confirmed that nothing had been sent to him from the office of Counsel. Petitioner attended the hearing, and offered testimony regarding the Court's Amended Findings of Fact and Conclusions of Law. Petitioner described a

list of objections to the ruling and the reasons for them, preserving the error for appeal. (VRP 10/26/12 p2-4)

Respondent's Counsel indicated support for the court's ruling, and requested attorney's fees. (VRP 10/26/12 p6) The Court awarded attorney's fees of $500 (VRP 10/26/12 p8), and directed the parties to work together to fill out an order. After several other unrelated motions were heard by the court, the court returned to the matter of the Respondent's response and request for attorney's fees. Petitioner referred to court rules (VRP 10/26/12 p11) that require as follows (PCLR 7(a)(4):

No motion shall be heard unless proof of service upon the opposing party is filed or there is an admission of such service by the opposing party. The court may also, in its discretion, impose terms upon the offending party.
(5) Opposing Papers. Any party opposing a motion shall file and serve responsive papers in opposition to a motion not later than noon, two court days before the date the motion is scheduled for hearing.
(6) **Reply.** Any papers in strict reply shall be served no later than noon, one court day before the date the motion is scheduled for hearing.

The requirement that an opposing party file responsive papers not less than two days before the motion was scheduled for hearing was clearly violated in that the Respondent's motion was filed on October 25, 2012, according to the LINX system, and the proceeding was held October 26, 2012. As noted, Respondent's Counsel made the claim to the court that 1) Petitioner had not

consulted her on the date, and 2) that her staff emailed a copy of the motion to Petitioner. (VRP 10/26/12 p12) Both are factually incorrect. Petitioner produced an email for the court's perusal wherein he specifically asked whether the date was ok; Petitioner did not receive a reply. Petitioner also provided to the court a followup email, asking whether the first email had been received--again, no reply. (October 2012 emails, Appendix 3) Finally, he called the office of the Respondent's Counsel, and received confirmation that she had received the emails (VRP 10/26/2012 p13). Contrary to the rules cited above, no affirmation of service of the motion of October 25, 2012 was filed by the Respondent's counsel with the clerk or presented to the court, and the court requested no affirmation of service; no copy of the alleged email sent by staff was provided to the court by Respondent's counsel. Rather, Counsel refers to a motion that she claims was filed on 27 September, 2012, and indicates that it is identical to the motion of October 25, 2012 (VRP 10/26/2012 p12) The LINX system shows a September 27 2012 motion which was filed by the Petitioner, --nothing filed by the Respondent on that date. Petitioner is aware of no motion filed by the Respondent in 2012 which is "identical" to the October 25 motion. Had there been such an identical motion, service of such motion would not relieve the Respondent

of the requirement that she serve the specific motion in question, filed with the clerk on October 25, 2012, on the Petitioner. Failure to do so, and failure to file the October 25, 2012 motion two days before the court proceeding as required by court rules cited above, prevented Petitioner from providing a response one day prior to the court proceeding, as provided in the rules cited above, and results in a denial of due process--which the court should be upholding, rather than rewarding its violation.

Rather than sanction the Respondent's Counsel for failing to serve Petiitoner with the motion, or for failing to file the motion two days prior to the proceeding as required by Court rules, and even in light of emails handed to the court, demonstrating the falsity of Counsel's contention that Petitioner failed to consult her on timing of the hearing, the Court indicated that Petitioner is asking for "some offset on the attorney's fees based on the late filing of your response" (VRP 10/26/2012 p16-17). Petitioner did not ask for "some offset"; Petitioner challenged the propriety of the award of attorney's fees altogether, given the irregularity of the Respondent's Counsel's late filing, failure to serve the Petitioner, and reliance on having served Petitioner with some other motion on some other date. (VRP 10/26/12 p13) Petitioner requests that the Appellate Court reverse the award of attorney's fees by the trial

court on October 26, 2012, in light of the irregularity of the proceedings, the improper claims by Counsel, and the violations of Pierce County Local Rules as cited.

CONCLUSION

The litigation has extended for almost all of the now-six-year-old child's young life--specifically as a result of the challenged procedural path at the trial court level, the original, and recent, judgments of the court, and the tactics of the Respondent. While the case has been carried at great expense and burden to the Petitioner, most critically the impact has been to the child, who has suffered from the continuing deprivation of the love, support and development she is due, as demonstrated by the extensive trial evidence--at this most critical juncture in her life. The demands of justice call upon the Appellate Court to speed these proceedings toward a just conclusion, to examine the evidence in the case, apply the law and court precedent, and to reverse the trial court and grant primary residential status to the Petitioner--in light of the trial court's challenged history on these questions. Continuing referral of the case back to the trial court for another years-consuming opportunity to attempt to meet the demands of the Appellate Court, the Supreme Court and the RCW, is profoundly unjust and contrary to the child's best interests. Any remand back to the trial court

should be for the limited and exclusive purpose of addressing visitation and child support provisions. In case of such limited remand, Petitioner requests detailed, clear and robust instructions to the court specifically on the question of visitation and child support, particularly in light of the challenges in the previous review. Petitioner asks that those instructions direct the court to give appropriopriate weight to provisions of the law requiring whether one party or the other has engaged in abusive use of conflict, in denying reasonable access to the child to the other party, and in contempt of court. As noted, if the Court will not reverse the trial court's ruling and award primary residential status to the Petitioner, Petitioner requests that the Court consider the fundamental shortcomings of the 2009 process, and grant a new trial.

Petitioner requests that the Appellate Court disqualify testimony regarding the period before December 2008, consistent with the trial court's procedural ruling; and that any portion of the trial court's ruling that relies on, or refers to, the Respondent's care for the child prior to December 2008 be reversed.

Petitioner requests that the award of attorney's fees against the Petitioner be reversed.

Cynthia Del Pan SC
24 May 2013

07-3-03417-9 39189058 RQ 09-14-12

APPENDIX 1

FILED
IN COUNTY CLERK'S OFFICE
A.M SEP 13 2012 P.M.
PIERCE COUNTY WASHINGTON
KEVIN STOCK, County Clerk
BY DEPUTY

SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE

Clyde (Mike) Reed Jr., **Petitioner,**	
vs	**NO. 07-3-03417-9**
Catherina Yvette Brown,	**REQUEST FOR CONTEMPT CITATION**
Respondent.	

I. SUMMARY OF FACTS

a. On November 19, 2009, the Judge Hickman signed the Order on Trial, which included the following directive: It is Ordered: 1) The respondent/mother shall correct the birth certificate and all legal documents such that the child's last name will be recorded as Brown-Reed.

b. Prior to the trial in the court of Judge Sergio Armijo, there had been an extended history, demonstrated in LINX filings, of contempt motions seeking compliance by the mother with requirements for including the father's last name in Tuscany's name on the birth certificate. In December, 2008, the father's attorney prepared a Judgement and Order Determining Parentage and Granting Additional Relief (JODGPAR) for signature by Judge Armijo, who had orally directed that the birth certificate be modified to include the father's last name. The mother, prior to Judge Armijo's signature on the document, struck reference to the "Reed" portion

of "Brown-Reed" unbeknownst to Reed's attorney, and returned it, in which condition it was signed. Nine months later, in the trial in the Court of Judge Hickman, the mother claimed that that document, which included a checkbox confirming the continuation of her status as primary residential status while the Armijo temporary plan was in place, used that JODPGAR to assert that the Armijo court had determined final residential placement in her favor. The Appellate Court determined that that position was false, and that the JODPGAR did not award final primary residential status to her, as she claimed to the Hickman court.

c. On September 11, 2012, Father sought and received from the Department of Health a copy of the Certificate of Live Birth of Tuscany Johnaudrina Hadiya Brown. *Under the designation for Father, the entry "none named" is inserted.*

2. These conditions demonstrate willful, purposeful and continuing violation of the terms of the parenting plan, which will only continue if the court does not provide meaningful response.

II. REQUESTED RELIEF

Petitioner respectfully requests that the court find the Respondent in contempt for continuing defiance of the court's orders.

Clyde Reed 9/13/20

Clyde H. Reed Jr.

Pro Se

STATE OF WASHINGTON
DEPARTMENT OF HEALTH

CERTIFICATE OF LIVE BIRTH

CERTIFICATE NUMBER: 146-2007-015633 DATE ISSUED: 09/11/2012

GIVEN NAMES: TUSCANY JONAUDRINA HADIVA
LAST NAME: BROWN

DATE OF BIRTH: FEBRUARY 14,2007
FACILITY: EVERGREEN HOSPITAL MEDICAL CENTER
PLACE OF BIRTH: KIRKLAND, KING COUNTY, WASHINGTON
TIME OF BIRTH: 12:09 A.M.
SEX: FEMALE

MOTHER'S MAIDEN NAME: CATHERINA V BROWN
PLACE OF BIRTH: NEW YORK
DATE OF BIRTH: 11/25/1964

FATHER'S NAME: *** NONE NAMED ***

FILING DATE: 03/20/2007

FEE NUMBER: 1715895

THE SEAL OF THE STATE OF WASHINGTON 1889

DOH 09-003 (12/11)

APPENDIX 2

07-3-03417-9 33237096 FNFCL 11-20-09

FILED
DEPT. 22
IN OPEN COURT
NOV 19 2009
Pierce County Clerk
By..... DEPUTY

Superior Court of Washington
County of Pierce

In re Parentage: Tuscany H. Brown Reed Clyde Mike Reed Petitioner, and Catherina Y. Brown Respondent	**No. 07-3-03417-9** **Supplemental Findings of Fact and Conclusions of Law**

I. Basis for Findings

The findings are based on:

[ ] agreement.
[ ] an order of default entered on _____ [Date].
[X] trial held on September 14-17, 2009

The following people attended:

[X] Petitioner [X] Respondent
[X] Petitioner's Lawyer [X] Respondent's Lawyer
[X] Other: Witnesses called by both parties.

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Seattle WA 98107
206.706.2909

ORIGINAL

II. Findings of Fact

Upon the basis of the court record, the court ***Finds***:

2.1 Any sensory integration disorder of the child in this case is not a childhood disability.

2.2 The mother has used the sensory integration issue as a means to prevent the father from having standard visitation with the child.

2.3 ~~The mother has been inconsistent with the~~ There was no miscommunication, as was claimed by the mother, regarding her failure to keep the child enrolled in occupational therapy.

2.4 Contrary to the assertions of the mother, there have been no bad faith or intentional violations of any court order by the father between December 2008 to the present.

while this case has been before Judge Hickman

2.5 Actions by the father were not manipulative, controlling, or an extension of any pattern of domestic violence.

2.6 If a protection order is to be extended it shall not be on the grounds of anything that has happened over the last ten months.

2.7 There is no evidence in the record to support any restriction on the father's visitation including the records and decisions issued by Judge Armijo. The opposite is true.

2.8 There are no 26.09.19 restrictions but if either parent ~~using~~ uses false pretenses to limit visitation or create conflict they could suffer dire consequences.
The child shall not be left alone with the maternal grandmother due to her lack of mobility.

2.9 The child has a strong, loving relationship with both parents. Neither parent relationship with the child causes concern.

2.10 Other:
The lack of overnights did not damage the father/child ~~BRT~~ bond

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III. Conclusions of Law

The court makes the following conclusions of law from the foregoing findings of fact:

3.1 Any sensory integration issues of the child is not a basis for any restriction on the father's visitation with the child.

3.2 There is no other basis for restrictions on father's visitation time with the child.

3.3 Any and all protection orders and restraining orders between the parties shall be amended to allow for communication and contact as necessary for the effectuation of the parenting plan, including:

a. email communication pertaining to parenting issues including scheduling, information sharing, joint decision making, etc.

b. pick-ups and drop-offs by the father from the mother's residences.

c. calls to the mother by the father on her cell phone regarding late transfers of the child

3.4 Each party shall pay their own attorney's fees.

3.5 Father will be given credit on child support payment for full payment of transcript from this proceeding.

3.6 There are no 26.09.19 restrictions at this time.

3.7 **Other:**

FILED
DEPT. 22
IN OPEN COURT
NOV 19 2009
Pierce County Clerk
By ..... DEPUTY

Dated: 11/9/09

Judge Hickman

Ivy Law Group PLLC
5606 14th NW, Suite B
Seattle WA 98107
206.706.2909

Presented by:

Ruth Emily Vogel, WSBA No. 18203
Attorney for Petitioner

Approved for entry:
Notice of presentation waived:

Pamela Solier, WSBA No. 34722
Attorney for Respondent

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206.706.2909

APPENDIX 3

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motion filed

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COURT OF APPEALS DIVISION II OF THE STATE OF WASHINGTON

Clyde Reed, Appellant

v

Catherina Brown, respondent

AFFADAVIT OF SERVICE
Court of Appeals No. 44151-9-II

COMES NOW the undersigned under penalty of perjury under the laws of the State of Washington, declare as follows:

That on the 24th day of May, 2013, I served upon Desiree Hosannah, attorney for the respondent, the following documents in the above-referenced case:

1. Opening Brief with corrected appendices and references
2. Motion Complying with May 6 2013 Ruling

SIGNED AND DATED THIS 24th day of May 2013 AT SEATTLE, WA.

\\CLYDE REED, Pro Se